2-25-2008

Burns Holdings v. Madison County Bd. Appellant's Reply Brief Dckt. 33753

IN THE SUPREME COURT OF THE STATE OF IDAHO

BURNS HOLDINGS, LLC, an Idaho Limited Liability Company,

Appellant,

v.

MADISON COUNTY BOARD OF COUNTY COMMISSIONERS, a political subdivision of the State of Idaho,

Respondent.

Supreme Court Docket No. 33753

Madison County District
Court Case No. CV-05-255

APPELLANT'S REPLY BRIEF

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Appeal from the District Court of the Seventh Judicial District
Of the State of Idaho, in and for the County of Madison
Honorable Brent J. Moss, Presiding

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I. CORRECTIONS TO CLAIMS IN RESPONDENT'S BRIEF OF FACTS ALLEGEDLY IN THE RECORD

Before responding to the arguments made by the Madison County Board of County Commissioners' (the "County" or "Commission"[1]) in their "Respondent's Brief", it is unfortunately necessary to correct certain factual claims made by the Commission as to items in the record before this Court. The claims made by the Commission that require correction are set forth in the following table in the order they appear in Respondent's Brief. The correction from the record is set forth in the neighboring column, and as to some of the claims made by the Commission, further discussed in the Argument section of this brief:

1 We regret that the County has referred to the Madison County Planning and Zoning Commission as the "Commission" in its "Respondent's Brief." Burns has referred to the Madison County Board of County Commissioners as the "Commission" in its briefing. To stay consistent with the "Appellant's Opening Brief," Burns will continue to refer to the Madison County Board of County Commissioners as the "Commission" in this brief.

CLAIM MADE BY COUNTY	CORRECTION FROM THE RECORD
"Among other opposition, the City of Rexburg appeared and requested that it be denied because it **did not conform** to the general principals for change at the north area of the county."[2]	After the County specifically requested comments from the City of Rexburg on an application submitted by Mr. Bruce Shirley in 2003 that would affect the Burns parcel then owned by Gayle Taylor (previous to when Gayle Taylor and Burns submitted their applications), the City of Rexburg's attorney provided the following comments at the planning and zoning meeting on the Shirley application: "Mr. Zollinger stated that he represented the City of Rexburg and had been asked to give their input regarding this proposed zone change. This proposed Commercial Zone Change **does conform** to the present general principles for change at the North area of the county, . . ."[3] For further discussion, see Section II.B.1 below.
"Significantly, the Order and record are absent of any statements raised by Burns in its Appellant's Opening Brief, dated December 3, 2007, pp. 6-9, as to what Judge Moss said or did not say while in chambers."[4]	In Judge Moss's October 17, 2006 written decision, Judge Moss awarded attorney's fees because "of the Board's obvious misinterpretation of evidence in the record . . . and a possible conflict of interest issue that one of the Board members may have had."[5]
"On April 13, 2006, the Board met for the purpose to again completely review the Burns hearing (as well as Walters) . . . The Board also reviewed the Walters matter they heard before the Burns matter on February 28, 2005 . . ."[6]	The Walters matter was not discussed at the April 13, 2006 meeting in any way. The complete transcript is in the record for this Court's review.[7]

2 Respondent's Brief at 1.
3 R. Vol. 4 Burns 2 at 3.
4 Respondent's Brief at fn. 44.
5 R. Vol. 1 at 505.
6 Respondent's Brief at 7.
7 R. Exhibit, *Public Meeting, RE Burn's [sic] Holdings, LLC*, April 13, 2006.

The Walters parcel "consists of approximately 119 acres."[8]	The acreage listed in the Walters application is 119.6 acres, but later testimony confirmed that it was actually over 130 acres.[9] The County is aware of the acreage at the site, and appears to be trying to minimize the size of the project.
"There are three interchanges that are commonly used in the City of Rexburg: the south interchange, the middle interchange and the north interchange. Of them, the south and the middle interchanges have commercial/industrial uses around them; the north does not. The fact is, seeing as the applicants' locations are drastically different, as are the proposed uses, the comprehensive plan treats them differently."[10]	The Madison County Comprehensive Plan (hereinafter "Comprehensive Plan") does not treat the three interchanges differently, nor has the County historically treated them differently. The south and middle interchanges have both existing commercial and industrial uses. For further discussion, see Section II.B.2 below.
"Regarding Walters, no concerns were voiced regarding the location access due to traffic volume, sight restrictions or vehicle speed, all of which were major issues in the Burns' hearing."[11]	Traffic was a major concern as to the Walters application, with a number of residents testifying of their concerns from the traffic that would be generated from the Walters project. For further discussion, see Section II.B.3 below.
"However, six industrial properties already existed in the neighborhood area, including one already working gravel pit."[12]	The "six industrial properties" referenced by the County are not all zoned industrial, rather, only one portion of one property is zoned industrial. Also, the businesses described by the Commission are nearly all commercial businesses. For further discussion, see Section II.B.4 below.

8 Respondent's Brief at 14.

9 See Appendix D at p. 4 (Issue: Quality and Quantity of Farm Ground to Be Developed) attached to Appellant's Opening Brief.

10 Respondent's Brief at 15.

11 *Id.* at 16.

12 *Id.*

"Approval of the Walters project in an area within city limits, bounded by a railroad line, where six other industrial sites, including one gravel pit already are in existence, is in full compliance with the Comprehensive Plan."[13]	Walters is not within the city limits of the City of Rexburg. Walters is not even within the City of Rexburg impact area. Walters is a number of miles outside the City of Rexburg impact area. For further discussion, see Section II.B.5 below.
"Mr. Pline's report also appears to have been prepared prior to the decision of Burns to add commercial businesses to the site, since the report stated that, "future development of the remaining property at the site is undetermined at this time."[14]	The record shows that Mr. Pline's report was prepared after Burns proposed the commercial buffer, not before as the County suggests. For further discussion, see Section II.B.6 below.
"However, Mr. Pline chose to ignore the warnings of Mr. Dyer as made on Page 2 of that analysis . . .[15]	Mr. Pline and Burns did not ignore Mr. Dyer's recommendations, and in fact, undertook specific action to address his recommendations. For further discussion, see Section II.B.7 below.
"Mr. Cureton had been requested to perform a traffic study on the site and report his findings at the hearing."[16]	Mr. Cureton performed a traffic **count**, not a traffic **study**, and his numbers were consistent with the numbers Mr. Pline used in his analysis and with the Keller Report.[17]

13 *Id.* at 16-17.

14 *Id.* at 24.

15 *Id.* at 25.

16 *Id.* at 26.

17 R. Exhibit Public Hearing *RE: Burns Holdings, LLC, Request for Comprehensive Plan Change*, February 28, 2005, at p.89, LL.1 through p.90, LL.17.

II. ARGUMENT

A. The County Has Not Articulated Its Standard on Each Issue in Relation to the Burns and Walters Applications, but Instead Has Only Argued that the Locations of the Properties Justified the Application of Two Different Standards.

When viewed as a whole, the Commission's treatment of Burns Holdings, LLC ("Burns") and its application was results-oriented and fundamentally unfair under the Local Land Use Planning Act (the "LLUPA"). While it has been necessary to explain, often in significant detail, the specific issues that have been raised in this appeal, the overarching principle governing this court's review is contained in the LLUPA:

> It is the intent of the legislature that decisions made pursuant to [the LLUPA] should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations **with an emphasis on fundamental fairness and the essentials of reasoned decision-making**.[18]

The purpose of this principle of fundamental fairness is to provide every person or entity appearing before a governmental zoning board the right to equal and fair treatment under the law. It is to prevent local prejudices, special interests, and exclusionary tactics from interfering with orderly growth and development. All applicants, whether domestic, such as Walters Ready-Mix ("Walters"), or from out of the area, such as Burns, are to be accorded the same fair treatment. The court's review of the Burns decision must be focused on principles of fairness and reasonableness and constitutional principles of due process. This scope of review is best explained as follows:

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18 IDAHO CODE § 67-6535(c) (emphasis added).

> Judicial review–be it of law-declaring, factfinding, law-applying, or discretion-exercising acts by agencies–returns repeatedly to the fundamental question of whether the agency action was reasonable. In evaluating the law-declaring function the issue is–at least once the agency's interpretation has been found to be a permissible one–whether the agency's decision reasonably advances the legislative goals. In reviewing facts as found by the agency the issue is the **reasonableness** of the inferences, credibility evaluations, persuasive impact, and the like: did the agency reasonably sift and weigh the information; In the law-applying and discretion-exercising judgments the questions focus on the **reasonableness** of the agency's decision processes and the reasons it offers for its decisions.[19]

As explained in Burns' opening brief, and as set forth further below, the Commission's findings of fact and conclusions were not supported by the record, and given the fortuitous decision on a nearly identical proposal from Walters–the sole source of concrete in Madison County– issued at the exact same time as the Burns decision, the comparison of these two decisions provides this court with a unique opportunity to juxtapose these decisions and determine whether the same standards were applied to both parties. They were not, and Respondent's Brief has failed to explain or justify the Commission's fact-finding and its inapposite application of standards to the Burns and Walters applications.

The Commission argues that the Burns and Walters properties are "drastically different"[20] and that "the problem with the residents and the [Commission] was largely Burns' location."[21] Based on the provisions of the Madison County Comprehensive Plan (Comprehensive Plan), and on past Madison County practices–which is the best indication of how Madison County has interpreted

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19 Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 IDAHO L. REV. 273, 366 (1993/1994) [hereinafter "Gilmore & Goble"]. The LLUPA adopts the judicial review provisions of the Idaho Administrative Procedure Act (the "IDAPA") for review of zoning board decisions. When judicial review of LLUPA decisions is undertaken, "a local agency making a land use decision, such as the Board of Commissioners, is treated as a government agency under IDAPA."

20 Respondent's Brief at 15.

21 *Id.* at 17.

its Comprehensive Plan–the location was ideal. But even if we assume that the location was not ideal, a difference in property location is not a legitimate reason for applying different standards. Safety at one site should be evaluated by the same standard as applied to another location. Effect on property values at one site should be evaluated by same standard as applied to another location, and so on. In sum, standards ensure that analysis is consistent, and, without the application of standards, decision-making is haphazard and capricious.

The Madison County Planning and Zoning Board (hereinafter "Planning and Zoning") recognized these standards and properly evaluated the Burns application, approving it with a six to one vote after Planning and Zoning worked with Burns to revise its previous application. Conversely, the Commission applied no standards in its decision-making in this matter, but was instead *ad hoc* rather than consistent and logical. This is evidenced by undertaking the simple task of articulating the County's "standards" on each issue in light of both the Burns and Walters decisions.

In Respondent's Brief, the Commission did not address Burns' primary argument that the County cannot lawfully apply differing standards on substantially identical issues in this matter. Nor did the County articulate its standard on any single issue, but instead recounted the facts surrounding the Burns and Walters applications in what appears to be an attempt to circumvent any explanation of the County's methods and standards in its decision-making. As this Court is aware, when

determining whether or not an alleged action is arbitrary and capricious, "the focus of this inquiry is on the **methods** by which the agency arrived at its decision . . . ."[22]

If the Commission can survive the arbitrary and capricious standard contained in the LLUPA simply by pointing out that two properties differ in their location–which, of course, will always be the case with two different properties–then the LLUPA would provide no meaningful recourse for results-oriented decisions made by land use bodies. This kind of decision-making violates not only principles of fundamental fairness, which is the emphasis of the LLUPA, but also specifically violates the arbitrary and capricious and substantial evidence standards contained therein.

The County's strategy in defending its decision on the Burns application appears to be to list all of the facts surrounding both applications with the hope that one of those factual differences will be enough for this Court to uphold the Commission's decision, rather than focus on the standards it applied to both. However, in doing so, the County has unfortunately misstated the record in regards to some important issues, which must be addressed. These misstatements are noted in the table contained in the above section, but some of the misstatements require the explanation provided in the following Section B.

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22 Gilmore & Goble at 365.

B. Corrections to Claims Made by the County Which It Erroneously Alleges Are Supported by the Record.

1. The City of Rexburg Did Not Claim That the Location of Commercial Property Did Not Conform to the Present General Principles for Change at the North Interchange. The Burns Proposal Does Conform to These Principles.

On the first page of Respondent's Brief, the Commission argued that when Gayle Taylor submitted an application for a zone change at the north interchange of Highway 20 (hereinafter, the "North Interchange") for commercial use, the City of Rexburg supported the Commission's conclusion that the application did not conform to the general principles for growth at the North Interchange. This claim is not accurate for two reasons: (1) It is not an accurate statement from the record, and (2) the comments from the City of Rexburg were not made in conjunction with an application submitted by Gayle Taylor; rather, they were comments provided in conjunction with a previous application submitted by Mr. Bruce Shirley. In Respondent's Brief, the Commission has confused these two proceedings and combined elements of both.

In 2003, Mr. Bruce Shirley submitted a request to amend the Comprehensive Plan and for a zone change for an area running from the North Interchange, along Highway 20, for approximately two miles to the Teton Lakes Golf Course, which involved numerous properties and was significantly larger in size and scope than the Burns proposal. A small portion of the entire property proposed for rezone was the Burns parcel, which was owned by Gayle Taylor at the time, and Ms. Taylor's entire parcel was proposed to be changed to commercial zoning. Minutes from the hearing before the Commission on this matter are found in the record at R. Vol. 4 Burns 2, which contains testimony from Bruce Shirley, Gayle Taylor, and Stephen Zollinger. It was in conjunction with this

application from Bruce Shirley that the County requested comments from the City of Rexburg. Rexburg's City Attorney Stephen Zollinger stated that "he represented the City of Rexburg and had been asked to give their input regarding this proposed zone change. This proposed Commercial Zone Change **does conform** to the present general principles for change at the North area of the county, . . ."[23] Thus, the claim made in Respondent's Brief that the City of Rexburg has claimed that commercial zoning does not conform to present general principles for change at the North Interchange is not accurate.

It is also important to note that the application was submitted by Mr. Shirley, not Gayle Taylor. Thus, Ms. Taylor never submitted an application to rezone the entire property commercial, which the Commission has claimed in Respondent's Brief. Even though the Shirley application was denied by the Commission,[24] the City of Rexburg has never changed its position with regards to the location of commercial property at the North Interchange in any of the proceedings following on Burns' application.

Because a rezone of entirely commercial property was not acceptable to the Commission, Gayle Taylor thereafter filed an application to change the Comprehensive Plan and zoning ordinances with regards to her entire property to light industrial. Even though the Madison County Planning and Zoning Commission ("Planning and Zoning") favorably recommended the requested industrial change with a four to three vote,[25] the Commission denied the requested change.[26] Thus,

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23 R. Vol. 4 Burns 2 at 3.
24 R. Vol. 4 Burns 2 at 4.
25 R. Vol. 4 Burns 4 at 7, 9.
26 R. Vol. 4 Burns 7 at 29.

the Commission denied an application to rezone the property as entirely commercial and an application to rezone the property entirely industrial.

Because neither a proposal to rezone the entire property as commercial or industrial was acceptable to the County, Planning and Zoning suggested a proposal to develop a small industrial parcel buffered with commercial property.[27] Acting in accordance with these suggestions, Burns, now the owner of the Taylor property, requested a zone change for the property from Transitional-Ag 2 to a combined industrial/commercial parcel of twelve acres of light industrial zoned land to construct a concrete batch plant, which was buffered by 37 acres of commercial property.[28] After reviewing the Burns application, it was recommended for approval by Planning and Zoning with a 6-1 vote.[29]

After years of working with Madison County, it appeared that the appropriate combination of commercial and industrial uses was proposed at the North Interchange acceptable to Planning and Zoning and apparently also to the City of Rexburg, because it did not appear to contest or change its previous position that location of commercial property on the North Interchange was appropriate.

Unfortunately, the Commission did not approve the Burns application, even with Burns' efforts of working with Madison County to propose a configuration satisfactory to both and in compliance with the Comprehensive Plan. The Commission has even gone so far as to argue that approval of the Burns application would "require a substantial rewrite of the existing Comprehensive

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27 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change*, February 28, 2005, at p. 99, LL. 23 through p.100, LL. 1-2.

28 R. Vol. 4. Burns 12.

29 R. Vol. 4 Burns 17; R. Vol. 4 Burns 22. The only vote against the Burns application was from Millie Andrus, which is explained in detail in Appellant's Opening Brief at 6 and footnote 15 of that brief.

Plan, including the modification of underlying goals and objectives of the Plan."[30] The Commission is alone is making this argument, one that is contrary to the position of Planning and Zoning and the City of Rexburg. This position further demonstrates the results-oriented nature of the Commission's decision on the Burns application.

Remarkably, even as far back as 2003, the members of the Commission acknowledged that the North Interchange was destined to developed commercially,[31] and reemphasized this position in 2005:

> Because of my comments everybody has heard here throughout the testimony that I've always seen that as a commercial area and regardless of how may residents are going to live there, you're going to have commercial developed at that site.[32]

The Burns application does comport with the general principles contained in the Comprehensive Plan. The development of the Burns site would (1) "maintain[] viable tracts of prime agricultural land,"[33] (2) protect "farm to market roads"[34] by limiting industrial and commercial traffic on these roads because of the Burns site's close proximity to a state highway, (3) locate commercial zoning "along or within the area of the highway corridors" because "[c]ommercial use in Madison County has traditionally been located along the state highways and in the Rexburg

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30 R. Vol. 4 Burns 29 at 41.

31 See R. Vol. 4 Burns 2 at 4: "Commissioner Passey said that he felt that along Hwy 20 would become Commercial in the future planning of the County . . ."

32 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change*, February 28, 2005, at p. 99, LL. 23-25 to p.100, LL. 1-2.

33 R. Exhibit 18 (Madison County Comprehensive Plan), at 15.

34 *Id.* at 22. The Burns parcel is very close to the North Interchange of Highway 20 where its traffic would not impact traffic in rural areas. The Walters property is located miles away from an interchange at Highway 20 and requires use of 4700 South to access the South Yellowstone Highway in order to access Highway 20.

area,"[35] and (4) group industrial uses[36] by placing the Burns site next to the Corneilson gravel pit located in Madison County and the industrial uses located south of the North Interchange either within the City of Rexburg or its impact area. The Burns proposal complies with these provisions, as well as past County practices at its interchanges. Overall, it does comply with general principles of growth and development at the North Interchange, and further, was proposed by Burns because Planning and Zoning suggested that it do so.

In sum, only the Commission determined that the Burns application did not comport to the general principles of growth for the North Interchange as contained in the Comprehensive Plan. Both the City of Rexburg and Planning and Zoning believe this type of development is consistent with general principles of growth in the North Interchange area. Indeed, Planning and Zoning even made the suggestion to buffer the industrial property with commercial property. This court has previously upheld a decision on a challenge to a comprehensive plan amendment in *Evans v. Teton County*, noting that "[t]he record indicates throughout this process Teton Springs adjusted its application in order to meet the requirements demanded by the Zoning Commission."[37] Burns worked similarly.

Even if Walters should not have been approved, Burns should have been approved because it meets the standards contained in the Comprehensive Plan. The Commission's claim that Burns would require a substantial rewrite of the Comprehensive Plan, which the Commission is alone in making, is without merit, results-oriented, and arbitrary and capricious.

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35 R. Exhibit 18 (Madison County Comprehensive Plan) at 16.
36 *Id.* at 17.
37 *Evans v. Teton County*, 139 Idaho 71, 77, 73 P.3d 84, 90 (2003).

2. The Madison County Comprehensive Plan Does Not Contain Differing Standards for the South, Middle, and North Interchanges.

In its briefing, the Commission correctly acknowledges that there are three interchanges that are commonly used to access the City of Rexburg: the South Interchange, the middle interchange, and the North Interchange, all of which are on Highway 20. The Commission is also correct that the south and the middle interchanges have commercial/industrial uses around them, but that the North Interchange does not.[38] In its briefing, however, the Commission failed to mention that industrial and commercial properties are also present at the location of a proposed state interchange at Thornton, which is located south of the South Interchange, and is currently an open access to Highway 20 without an overpass interchange.[39] At the April 13, 2006 public hearing, Commissioner Muir made the following comment:

> If we look at here down Main Street we have commercial areas developed off of that interchange definitely. If we look at the next interchange to the south, we have commercial areas around it and we have two industrial areas because we have potato plants that are complementing each other in that area. If we go further south to Thornton, we have industrial areas coming off of those interchanges with some commercial.[40]

While the County is correct in its description of commercial and industrial properties surrounding all of the interchanges along Highway 20 (except for the North Interchange), the Commission thereafter incorrectly claims the following:

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38 Respondent's Brief at 15.

39 If constructed, the Thornton interchange would truly be the gateway into Madison County for those traveling north on Highway 20.

40 R. Exhibit, *Public Meeting, RE Burn's [sic] Holdings, LLC,* April 13, 2006, p. 37, LL.3-11.

> The fact is, seeing as the applicants' locations are drastically different, as are the proposed uses, the comprehensive plan treats them differently."[41]

The Madison County Comprehensive Plan does not contain differing standards for the North Interchange from the middle and south interchanges, and therefore, does not treat them differently. The entire Comprehensive Plan is in the record for this Court's review, and the Comprehensive Plan contains no specific standards relative to the County's interchanges.[42]

In addition, the proposed uses of Burns and Walters are not "drastically different." Both applications requested land use changes from agricultural-type zoning to industrial zoning surrounded with a commercial buffer. This claim by the Commission is not supported with information from the record. In fact, it is clear that Madison County has established a practice of locating commercial and industrial zones around its Highway 20 interchanges. Such an approach is supported by the Comprehensive Plan and has been followed historically. The Burns proposal comported with this practice, while the Walters proposal (which is not located near an interchange) did not. Clearly, however, the Comprehensive Plan does not contain differing standards for the three major interchanges on Highway 20 which access the City of Rexburg. Burns therefore does not understand, nor has the Commission ever explained, why Burns and Walters were treated differently on this issue.

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41 Respondent's Brief at 15.

42 R. Exhibit 18 (Madison County Comprehensive Plan).

3. Traffic and Safety Were Issues Raised in the Walters Hearing.

Instead of addressing the County's application of opposite standards on traffic and safety relative to Burns and Walters, the County instead argues that traffic and safety was not an issue in the Walters hearing. Specifically, the County argues that "no concerns were voiced regarding the location access due to traffic volume, sight restrictions or vehicle speed, all of which were major issues in the Burns' hearing."[43]

The record does not support the Commission's claim that "no concerns" were voiced at the Walters' hearings relative to traffic issues. The following individuals either testified or indicated their concern about traffic associated with the Walters proposal at both the Planning and Zoning meeting and the Commission meetings on Walters: Lewis Cameron, Kort Black, Georgia Hansen, Joel Jenkins, Frank Jenkins, Christian Nelson, Lou Cameron, Ken Anderson, Jeff Andrew, Heather Rich, and Lori Hansen.[44] As examples, consider the following statements made by Heather Rich and Lori Hansen:

> My second main concern is traffic flow. I commute down – is it 4700? . . . There are school children that stand on that street and are dropped from school buses. It's very narrow. I have been down that road many times with all of the semi's that go down and are carrying to the existing gravel pit and it is very dangerous. It's even dangerous to be on the road in a vehicle, let alone with children on the road. That's one of my biggest concerns. In part of this global planning and global design there is no consideration of expanding the road, no consideration of those that live on that road and that's one of my big concerns.[45]
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> . . .

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43 Respondent's Brief at 16.

44 R. Vol. 4 Walters 8, 10, 11.

45 R. Exhibit, *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, p.37, LL.1-14.

> On Cameron Lane alone, we have 35 children. This is one street, one cul-de-sac. We live on the Lyman-Archer Highway, we border it. The Edstrom's trucks go up and down and up and down. They make me nervous. I am not looking forward to more trucks and gravel up and down, and up and down on 4700 South really does scare me.[46]

In addition, County residents suggested that Walters construct a road through the middle of its property so that both the Walters trucks and the trucks from neighboring Edstrom's gravel pit could use this road and avoid 4700 South.[47] The suggestions made by these residents speaks for themselves with regards to the concerns residents had concerning traffic. Ultimately, Walters refused to consider construction of such a road.[48]

Further, it is contrary to the record for the Commission to make the argument that traffic and safety were not concerns at the Walters hearing because, at the time the Walters decision was made, concerns were raised by citizens and the Commission itself that the location of where to construct the new interchange at Thornton had not been decided. In fact, Walters had not even specified where its ingress or egress onto its property would be located, and, perhaps most significantly, Walters had not yet obtained a permit from the State of Idaho for an access to connect with the South Yellowstone Highway (State Highway 191). Consider these comments made by Walters' attorney:

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46 R. Exhibit *Public Hearing Transcript, RE: Walter's Concrete Request for Zone Change*, February 28, 2005, p.25, LL.22 through p.26, LL. 1-3.

47 R. Exhibit, *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, p.43, LL.18 through p.44, LL.2.

48 As stated by Walter's attorney: "Don't want to share a road with Edstroms. I want to make sure this is clear. You can appreciate–first of all, that was not the context, at least that's not what I meant. If you go back to the picture, obviously what I'm doing here, if you come across here from Edstrom's and go across, you realize that you've done to a gravel pit if you haven't had a road through there. We've already conceded and said all this can be commercial, we'll do that because that was your plan, but to do the other, in essence, takes it right in half–gosh, then sure, we might as well walk way and I'm sure some would say great. That certainly guts the whole intent of this." R. Exhibit, *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, p.47, LL.17-25 through p.48, LL.1-4.

> Another issue is vehicle travel. We have already acknowledged and recognize that we would wish to, if we can, have the flexibility of course, but wish to go to the road, to the State road, just as easy and fast as possible. The interesting part of it depends on whose routes you're going. Some people want to enter the State highway immediately west of the property, others want us to go south of the property because if that's the interchange they want to get us on the State highway faster than the County highway–well, I guess they're both State highways–in other words, the dual lane highway rather than the other one. . . . We don't know where the exchange is going to be yet. We don't know what kind of constraints we're going to have. Obviously, you can appreciate that he needs to keep the flexibility there, ...[49]

> First of all, as to the issue of traveling down 4700 . As we said in the Planning and Zoning and we say here. It is not the intent to go down 4700, especially past those homes. The only question here is an exit strategy, which is best. Until the off ramp is actually made, there is no way to know that . . .[50]

> For the purpose of leaving the property, I guess that I didn't make it clear enough. Mr. Walters does fully intend, if he can, to exit by way of the State Highway. Obviously, that still requires a permit from the State Highway. Until the State Highway actually makes a determination as to whether or not there is going to be an exit from the dual lane highway, kind of puts us in a bad position.[51]

Traffic and safety were certainly significant issues with the Walters proposal. Yet, even so, the Commission did not require traffic studies, reports, counts, etc. It is arbitrary and capricious for the County to have such differing standards on this issue depending upon whether or not the applicant before it is already a member of the local community.

In summary, Burns had an entrance constructed by the Idaho Transportation Department ("ITD") as its access, which still meets all state and federal standards,[52] while Walters did not have any designated access. This fact very clearly evidences the Commission's results-oriented motives

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49 *Id.* at p.10, LL. 21-25 through p.11, LL. 1-15.

50 *Id.* at p.45 LL.10-15.

51 R. Exhibit *Public Hearing Transcript, RE: Walter's Concrete Request for Zone Change*, February 28, 2005, p.28, LL. 15-23.

52 R. Vol. 4. Burns 8 at p.20, LL. 5-10.

as to the Burns application, and the County's attempt to downplay concerns for traffic and safety expressed by Madison County's residents in regards to the Walters application is neither a fair nor accurate assessment of the record.

4. The Commission's Claim That Six Industrial Properties Already Existed in the Areas Surrounding the Walters Property Is Not Accurate.

Idaho law mandates the creation of a comprehensive plan separate from a zoning ordinance.[53] The comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for land within a jurisdiction.[54] Further, "[a] comprehensive plan is not a legally controlling zoning law, it serves as a guide to local government agencies charged with making zoning decisions."[55]

In its attempt to distinguish the Burns and Walters applications, the Commission has focused on one single aspect of the Comprehensive Plan and used that aspect in its land use planning while ignoring other aspects of the Comprehensive Plan. The principle in the Comprehensive Plan cited by the Commission is that "[t]he County will encourage the grouping of industrial uses . . . ."[56] As to Walters, the Commission has argued that the Walters' project would be located in an area with six supposed existing industrial uses, and this fact justifies the County's decision as to both Burns and Walters:

> Six industrial areas exist within the surrounding area: Mountain West Bark, commonly referred to as the bark plant, is in an industrial zone located to the North of the site, Western Fence, Inc., is a non-conforming use located West of the site; Bench Mark Potato is a non-conforming use located West by South West of the site;

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53 See IDAHO CODE § 67-6508.

54 IDAHO CODE § 67-6508; *Whitted v. Canyon County Board of Commissioners*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002).

55 *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003).

56 R. Exhibit 18 (Madison County Comprehensive Plan) at 17.

> Mr. Drive Line is a non-conforming use located South of the site; Edstrom gravel pit is a non-conforming use located East by North East of the site.[57]

This statement is inaccurate and misleading.

The only **zoned industrial area** close to Walters is a portion of the property where Mountain West Bark is located.[58] Mountain West Bark was a pre-existing industrial use that was "grandfathered" by the County. The property was not planned for industrial use, and the owner has since spread onto property that is not zoned industrial, which has raised serious concerns with neighboring landowners.[59] Furthermore, Western Fence, Inc., Bench Mark Potato, Mr. Drive Line, and Edstrom's gravel pit (which operates under a "grandfathered" Conditional Use Permit) are not located on industrial zoned property. In fact, these are commercial businesses, and not industrial sites. Thus, the only industrial area close to Walters is the "grandfathered" industrial portion of the Mountain West Bark property.[60] There has therefore been no "grouping" of industrial uses as argued by the Commission.

Further, if the Commission's logic is followed, the Burns parcel is likewise grouped with other industrial uses as it is located next to the Cornielson gravel pit. If the Commission were consistent in this standard, then Burns would likewise meet this provision of the Comprehensive

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57 Reply Brief at 38; See also R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191,* April 11, 2005, at 13-14.

58 R. Burns 15 at 4. The small light industrial portion is on the northeast portion of the property.

59 See generally the testimony of citizens contained in the public hearings transcripts involving Walter's in regards to the Mountain West bark plant. For examples, see the testimony of Lou Cameron found at R. Exhibit, *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, at p.41, LL.4 through p.42, LL.12, and the testimony of Cort Black found at R. Exhibit *Public Hearing Transcript, RE: Walter's Concrete Request for Zone Change*, February 28, 2005, at p.15, LL.22 through p.16, LL. 17.

60 R. Burns 15 at 4. See also R. Exhibit, *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, at p.18, LL.16-21.

Plan. Thus, on this "grouping" issue, a different standard was applied to Walters than to Burns, and the County's unsubstantiated claim as to the grouping of industrial uses does not explain the justification for differing treatment.

However, even if Burns did not comply with the grouping provision of the Comprehensive Plan, failure to comply with this single provision of the Comprehensive Plan is not fatal to the Burns application. In its review of the Burns application, the Commission is simply required to look at all facets of the Comprehensive Plan and assure that the Burns proposal fits within all of the various considerations set forth in the plan. It is not uncommon that a proposed development of a piece of property may not agree with every single provision in the Comprehensive Plan. These principles were discussed in the case of *Urruita v. Blaine County*.[61]

In *Urruita*, the applicant proposed the subdividing of his property, which was rejected by the Blaine County Commission because, in its view, it did not support agriculture, a principle articulated in the Blaine County Comprehensive Plan. Upon review, the Idaho Supreme Court held the following:

> The question presented is what is meant by the phrase in the subdivision ordinance requiring the Board to determine that the land to be subdivided "shall conform to the Comprehensive Plan." This requirement requires only that the land to be subdivided generally comports with the overall goals of the comprehensive plan. Blaine County's comprehensive plan not only discusses the importance of agriculture to the area, but also sets forth guidelines regarding economic development, housing, land use, public services, facilities and utilities and recreation, among others.
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> . . .

61 134 Idaho 353, 2 P.3d 738 (2000).

> In determining whether the land "conforms to the comprehensive plan" for the purposes of a subdivision application, **the Board is simply required to look at all facets of the comprehensive plan and assure that the land fits within all of the various considerations set forth in the plan. It is to be expected that the land to be subdivided may not agree with all provisions in the comprehensive plan** . . .[62]

Thus, it is not appropriate for the Commission to single out one provision of the Comprehensive Plan to justify an intended result. Rather, the Commission is supposed to determine if the Burns application complies overall with the various considerations set forth in the plan, even though it is possible that the application may not meet all of those provisions. As set forth in this brief, the Burns parcel does comply overall with the provisions of the Comprehensive Plan.

5. The Walters Property Is Not Located Within the City Limits of the City of Rexburg.

In another inaccurate statement made by the Commission, it has argued that the Walters project was approved because it is "**within** city limits, bounded by a railroad line, where six other industrial sites, including one gravel pit already are in existence, is in full compliance with the comprehensive plan."[63] However, just as with its claim that Walters is grouped with other industrial users, the claim that the Walters property is within Rexburg city limits is simply untrue. In fact, as previously acknowledged by the Commission itself, the Walters property is located "outside the area of city impact of the City of Rexburg."[64] Indeed, if Walters was requesting a land use change and

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62 *Id.* at 357-59, 2 P.3d at 742-44 (2000) (emphasis added).

63 Respondent's Brief at 16-17 (emphasis added).

64 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191,* April 11, 2005, at 14 (the Commission's Written Decision on the Walters Application).

its property was located within the City of Rexburg city limits, it would have had to apply to the City of Rexburg for the land use change.[65]

The Commission has apparently made this claim in light of the following Comprehensive Plan provision:

> The majority of industrial uses shall be located within area of impacts where city services are more likely available.[66]

In its haste to justify the Walters decision, and claim that the Walters proposal fully complied with the Comprehensive Plan, the County has misstated where the Walters property is located. Thus, not only is the Walters property located outside of both Rexburg and Rexburg's area of city impact, the Walters property was not even adjacent to the area of city impact–in fact, it is miles from the city impact area boundary.

Conversely, the Burns site is located next to the area of city impact for Rexburg, just across Highway 20 from the northern border of the area of city impact. The issue of city services was not significant to Burns' proposed rezone because of its location and the present location of those services on the south side of the North Interchange. In fact, at the time Burns filed its application with the County, there had been discussions that either Rexburg or Sugar City could include the Burns site in their impact areas in the near future. Nevertheless, the Commission determined that approval of the Burns application would be contrary to the Comprehensive Plan because it was not

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65 The application filed by Walters was, of course, with Madison County, not the City of Rexburg. See R. Vol. 4 Walters 1.

66 R. Exhibit 18 (Madison County Comprehensive Plan) at 17.

located within an area of city impact. Based on this rationale, however, the Walters proposal should likewise not have been allowed. Nevertheless, because the Commission applied *ad hoc* standards, it concluded that Burns failed to meet this provision of the Comprehensive Plan, while Walters did meet this provision, going so far as to claim the Walters property was located within Rexburg in order to justify its decision. This is obviously inaccurate and contrary to the record and further indicative of the Commission's biased results-oriented process.

6. The Commission's Claim That Mr. Pline's Report Appears to Have Been Prepared Prior to the Decision of Burns to Add Commercial Businesses to the Site Is Not Supported by the Record.

In its continuing effort to discredit the report prepared by Mr. Pline, the Commission has argued that "Mr. Pline's report also appears to have been prepared prior to the decision of Burns to add commercial businesses to the site, since the report stated that, 'future development of the remaining property at the site is undetermined at this time.'"[67] This is not true, and furthermore, does not tarnish Mr. Pline's analysis.

Pline's report was prepared after the Taylor application hearings, where Planning and Zoning suggested, after the Commission denied the proposal to zone the entire site industrial, that the site should include a commercial buffer. As to commercial traffic, Mr. Pline explained why he could not analyze future commercial traffic:

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67 Respondent's Brief at 24. The Commission has criticized Mr. Pline for misstating the speed limit through the North Interchange, but this is not a fair criticism of Mr. Pline. The context in which Mr. Pline misstated the speed limit was not related to his analysis of the Burns site, rather, it was a suggestion to lower the speed limit by 10 mph through the North Interchange to address concerns individuals had about speeding motorists through the area.

> It is recognized that the Concrete Batch Plant development uses only a portion of the site. However, the future development of the remaining property at the site is indeterminate at this time. The future development of the remaining property, type of development, traffic generation and roadway impacts will have to be addressed at a later time when that development request is submitted.[68]

Further, commercial traffic did not appear to be a significant issue because the Comprehensive Plan states that commercial uses should be placed along transportation corridors or State highways.[69]

Although Burns incorporated the commercial buffer in response to the suggestion from Planning and Zoning, the Commission now criticizes Burns for not providing more detailed traffic information for the commercial buffer Planning and Zoning proposed . In fact, the Commission relied upon this criticism as a basis for its disapproval of the Burns application even though no traffic analysis at all was required for the similar Walters application.[70] Also based on Planning and Zoning's suggestion, Walters had amended its application to include a commercial buffer around its industrial zone, which was approved without the Commission even questioning future commercial traffic.

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68 R. Exhibit 12 Tab 3 at *2.

69 R. Exhibit 18 (Madison County Comprehensive Plan) at 16.

70 Walters' attorney testified as follows:

However, the Planning and Zoning, in the first hearing that we had before them, the P&Z suggested that you, the Commissioners, had done a very Comprehensive Plan years ago and then part of that you felt like a corridor of the commercial designation to the extent that you are seeing here was justified, and in essence, is something that overall, because not knowing where the highway will have its exits, not knowing what is going to happen on that corridor, a commercial zoning would be significant and more appropriate.

[L]et's go to the commercial first of all, . . .I think its' important to know that the commercial was followed precisely with your overall Comprehensive Plan that you put together a number of years ago, ... Mr. Walters, in his original application did not have that, but felt that he could work and still make this thing work in keeping in harmony with that request. As a matter of fact, it was brought up by Mr. Jeppesen, who was on the Planning and Zoning and used to be on the Commission, he felt that was a very important issue, so that is why the change was made. R. Exhibit, *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, at p.7 LL. 21-25 through p.8 LL. 1-6; p.5 LL. 3-17.

In sum, there can be no legitimate explanation for why the County would suggest the inclusion of commercial property as encouraged by the Comprehensive Plan in Burns' proposal and then disallow the proposal because of the perceived traffic issues from the commercial property, while at the same time approving the Walters proposal and its commercial buffer without any identification of specific commercial uses that would locate there or any traffic analysis at all.

7. Pline Did Not "Ignore the Warnings of Mr. Dyer," Who Prepared an Earlier Assessment of the North Interchange.

In Respondent's Brief, the Commission contends that Mr. Dyer issued a warning that Mr. Pline ignored.[71] However, the quotation offered by the Commission to support its contention simply states Mr. Dyer's concern about a potential sight-distance problem where traffic in the proposed left-turn bay north of the North Interchange would obstruct views of southbound traffic, and his conclusion that the potential problem "further justif[ies] keeping the [Burns] approach to the north."[72] To the extent the Commission claims that Burns did not work to keep the Burns approach as far north as possible, the claim is simply wrong. The recommendations of Mr. Dyer were not ignored. To the contrary, they were specifically adopted.

The Burns parcel was originally part of a larger parcel which was segmented by the U.S. 20 Rexburg Bypass Relocation. ITD envisioned a frontage road adjacent to Highway 20.[73] According to Tom Cole, an ITD district engineer, the presently existing access "was designed years ago when

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71 Respondent's Brief at 25.

72 R. Exhibit 12 at Tab 3 (Letter from Winston Dyer to DaNiel Jose, December 31, 2003, at p.2).

73 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change,* February 28, 2005, p.9, LL.13-18.

the interchange was actually constructed for accessing into that property. It still appears to be a safe one based on the criteria in order to get funded through Federal Highway Administration for a project such as this."[74]

It is important to note that Mr. Dyer's letter was written on December 31, 2003 in relation to the Taylor hearings. After the Taylor applications were denied, Burns took measures to improve the site access by purchasing the property formerly owned by Bruce Shirley. With the purchase of this small acreage (approximately two acres), Burns actually improved the original ITD design.[75] The original access to the Burns site was put in place by ITD when it put in the North Interchange and it is the only access to the property. The change permitted a more level entrance with better sight lines for traffic entering or exiting the Burns facility. Burns also agreed to pay for a left-turn bay. For the Commission to state that Burns did nothing to accommodate Mr. Dyer's request is therefore plain error, as Burns purchased additional property and obtained an assignment of the prior easement held by ITD to improve ITD's previous safe design.

C. Without Substantiating Evidence from Those Testifying at Hearings on the Burns Matter, the Principle Articulated in *Evans v. Board of Commissioners of Cassia County*, 137 Idaho 428, 50 P.3d 443 (2002) Was Not Followed.

In the Respondent's Brief, the Commission argues that "the credibility of the witnesses and evidence was assessed first hand by the [Commission]."[76] In support of this argument, the

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74 R. Vol. 4. Burns 8 at p.20, LL. 5-10.

75 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change,* February 28, 2005, at p.5, LL.25 through p.6, LL.8.

76 Respondent's Brief at 19.

Commission argues that, under Rules 701 and 702 of the Idaho Rules of Evidence, once a witness has been qualified to testify in a given issue, the weight ultimately assigned to that witness' testimony "is left completely to the trier of fact" and "[n]either the Rules of Evidence, nor case law, requires a trier of fact to assign more weight to the testimony of an expert as opposed to a lay person."[77] The Commission, in its briefing, thereafter recounts some testimony from residents about their traffic experiences, and then states that there "were numerous exhibits, written documents, and tapes entered into evidence for the [Commission]'s review, and the witnesses appeared so the [Commission] could assess their credibility firsthand."[78]

This claim is misleading. While there were documents submitted by the residents setting forth their opinions on the project in general, in regards to the vital issue of traffic and safety, there were no exhibits, accident records from Madison County, photographs, information or studies from the State of Idaho, nor any other evidence to support the contentions made by the residents. As to the North Interchange in particular, even the County's own Keller Report did not list the North Interchange as one of the fifteen highest crash locations in Madison County from 1997 to 2001, nor was the North Interchange mentioned as a problem area.[79] It is important to note that in the analysis prepared by Keller Associates, these engineers performed the following analysis as to accident data for Madison County:

> In order to complete the safety analysis, raw crash data was requested from the Idaho Office of Highway Safety. This data consists of a short paragraph describing

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77 *Id.* at 20.
78 *Id.*
79 See R. Exhibit 10, Keller Report, at p. 2-33 through 2-36.

> accident location, the day, time of day, road surface conditions, vehicle type, driver age, weather conditions, road surface conditions, contributing crash circumstances, and other pertinent information.[80]

Without supporting evidence on an issue such as traffic and safety, such as the accident data obtained by Pline and Keller Associates, the evidence presented by the residents–and relied upon whole-heartedly by the Commission–is clearly anecdotal, meaning it is based on perception or hearsay only, and not on proven facts or analysis offered to support that perception.[81] Put another way, it is based on personal opinion and emotion.

Consider that among the claims of the residents were that (1) one witness could not get his truck up to fifteen miles per hour when he exited his property and hit the top of the North Interchange (a distance of over 800 feet, or nearly three football fields),[82] or (2) that there had been "15 accidents" on the Salem Road, or (3) that there had been "six major accidents and one or two minor ones"[83] on Salem Road. There was no evidence or information submitted supporting any of these oral claims. Those county residents claiming a far greater number of accidents at the North Interchange than identified in any of the expert reports could have requested supporting documentation from the Madison County Sheriff's Office, the Idaho State Police, the Idaho Office of Highway Safety, or other agencies–all of which is readily available to the Commission–supporting

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80 *Id.* at 2-33 through 2-24.

81 Anecdotal is defined as: "1. pertaining to, resembling or containing anecdotes. 2. based on incidental observations or reports rather than systematic evaluation." WEBSTER'S UNIVERSAL COLLEGE DICTIONARY at 30 (2001).

82 While it is difficult to tell strictly from the written words of the record, it does not appear that Mr. Val Ball, who make this statement, meant it literally when he stated he could not get his vehicle up to 15 mph by the time he hit the middle of the North Interchange. Mr. Ball's driveway is just north of and across the Salem Road from the Burns parcel, which is over **800 feet** from the top of the North Interchange. The County has apparently concluded that he meant this statement literally, which seems to be a misuse of this statement.

83 Respondent's Brief at 27.

their contention that a number of accidents at the North Interchange were either not reported to ITD or not documented. This was not done. Testimony was presented, but no evidence or exhibits supporting that testimony was provided, which is contrary to the principle articulated in *Evans* v. *Board of Commissioners of Cassia County*. Thus, the testimony provided by those opposed to the Burns application can only be considered objections based on personal opinion and emotion rather than on the Comprehensive Plan and violations of its policies. In *Evans v. Teton County*, the Idaho Supreme Court discounted these types of objections, which are "based on personal opinion and emotion."[84]

Burns contends it is only reasonable to require some kind of documented evidence to support adverse claims made on an issue that does, in fact, have documents to support it, when a project proponent's experts have documented the existing conditions. Thus, when it comes to accidents, speeding, and claims of a dangerous traffic situation, there are independent and unbiased sources to which parties can turn in order to verify their perceptions, including the County's own accident and traffic records and the Keller Report. Without requiring this type of evidence to support oral claims on issues that have an independent and unbiased method of documenting the issue, a County's sole reliance on "personal opinion and emotion" should constitute a violation of the rule articulated in the *Evans* case. Put otherwise, if the County is allowed to rely on anecdotal information only, then the Commission could literally decide a matter on anything said at a land use hearing, no matter how

84 *Evans v. Teton County*, 139 Idaho 71, 77, 73 P.3d 84, 90 (2003).

meritless. This hardly inspires confidence in the land use process, nor does it satisfy "fundamental fairness and the essentials of reasoned decision-making,"[85] which the LLUPA emphasizes.

Additionally, we would note that the personal opinions and emotion of individuals can change for any reason, and this makes such opinions and emotion unreasonable to rely upon when making a land use decision. Consider, for example, minutes of testimony presented by Bruce Shirley in 2003 in regards to development of the North Interchange when he was the applicant for a Comprehensive Plan and zone change involving the Burns parcel:

> Mr. Shirley stated that he was responsible for selling the property and the first commercial venture considered for this property was a **truck stop**. He reported that he had looked at the area and felt it would be safe for commercial use and the seven seconds anticipated to make a traffic decision in this area would be sufficient. He also felt there was good visibility and was not sure why this commercial zone change process was so hard. As he listened to the discussion between the P & Z Commission members, he was concerned about their discussion of this change affecting the homes around the golf course. He stated that this was a practical approach and is a normal place for business to go. . . He wanted to endorse this proposal[86]

And compare Mr. Shirley's above statement with statements he made at the Comprehensive Plan hearing on the Burns application:

> Not only are we strongly opposed because of our personal reasons, but we feel it is against the laws and ordinances that are currently on the books of Madison County. The State of Idaho has delegated the local government to adopt regulations designed to promote public health, safety and general welfare of its citizenry. We feel that the

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85 IDAHO CODE § 67-6535(c) (emphasis added).
86 R. Burns 2 at 3. (emphasis added)

> proposed changes are against the charges that the State of Idaho has so faithfully passed on to our local government.[87]

Mr. Shirley thereafter submitted his specific opposition in writing, which is found at R. Vol. 4 Burns 10. As shown by this example, opinions and emotion can shift easily and quickly, which is why it is imperative that land use bodies base their decisions on hard evidence and not on personal opinion and emotion.

Despite the lack of hard evidence to support the residents' claims, despite Planning and Zoning's findings of fact, and despite the expert reports, the Commission states that the unsupported testimony of the residents "carried significant weight" with the Commission."[88] The Commission's whole-hearted reliance on the unsupported oral testimony which was contradicted by professional, expert testimony is arbitrary, capricious, and an abuse of discretion, and further demonstrates that the Commission's decision was not supported by substantial evidence.

D. A Substantial Right of Burns Has Been Prejudiced. A Takings Analysis Is Not the Proper Analysis for Determination of Whether a Substantial Right of Burns Has Been Violated.

The County maintains that no substantial right of Burns has been violated, yet in doing so it is has not addressed the arguments contained in Burns' opening brief, which are based on Idaho case law. As explained before, the LLUPA adopts the judicial review provisions of the Idaho Administrative Procedure Act (the "IDAPA") for review of zoning board decisions.[89] When judicial

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87 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change*, February 28, 2005, at p.17, LL.22 through p.18, LL.5.

88 Respondent's Brief at 11.

89 *Friend of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002).

review of LLUPA decisions is undertaken, "a local agency making a land use decision, such as the Board of Commissioners, is treated as a government agency under IDAPA."[90] Judicial review is a two-step process, wherein "[t]he party appealing the Board of Commissioners' decision must first show the Board of Commissioners erred in a manner specified under I.C. § 67-5279(3), and second, that a substantial right has been prejudiced."[91]

From the beginning, Burns has claimed that it has had substantial rights violated because the Commission has been arbitrary and capricious in its decision-making, and has made factual findings which are not supported by substantial evidence in the record. These errors have resulted in a decision in which the Commission did not evaluate the Burns application properly.

One of the Idaho cases specifically discussing the substantial rights issue, *Sanders Orchard v. Gem County,*[92] was discussed in detail in Appellant's Opening Brief. In the *Sanders Orchard* case, the Gem County Commissioners relied upon a purported fact to form the basis of their decision relative to a proposed subdivision. Upon review, the Idaho Supreme Court found that no written documents or oral testimony was submitted regarding the purported fact that the City of Emmett's central sewer and water lines would be extended to the subdivision in the reasonably near future. The court held that the commission's findings were therefore not supported by substantial evidence. In addition, because no evidence was presented as to the sewer and water extension, the court held that "substantial rights of Sanders Orchard have been prejudiced by the Board's action in basing its

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90 *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003).
91 *Id.* at 75-76, 73 P.3d at 74-75; *See also* IDAHO CODE § 67-5279(4).
92 137 Idaho 695, 52 P.3d 840 (2002).

decision on an issue upon which no evidence was presented."[93] As a result, the court vacated the commission's decision. *Sanders Orchard* therefore holds that there is sufficient prejudice to the substantial rights of an applicant if a county bases its decision on a finding which was not supported by evidence in the record. This is precisely what occurred with Burns.

In *Evans v. Board of Commissioners of Cassia County,*[94] the appellants claimed that the Cassia County Commissioner's visit to a proposed use site, "without notice to or the presence of the interested parties, was a due process violation amounting to improper procedure."[95] The Court stated that "[t]here was substantial evidence presented at the hearing upon which the Board could have based its decision, wholly independently from the visit to the property."[96] After noting its duty to view the proceedings and decisions of a commission "with an emphasis on fundamental fairness and the essentials of reasoned decision-making," the court concluded that "whatever knowledge the Board may have gained from visiting the property was not necessary to form the basis of its decision, as the hearing yielded substantially the same evidence as could have been garnered during the visit."[97] As a result, the court concluded that no substantial rights had been violated.

In the recently-decided case of *Lane Ranch Partnership v. City of Sun Valley,*[98] the Idaho Supreme Court determined whether or not the Sun Valley city council unreasonably interpreted its ordinances to require the landowner to submit a particular application in order to construct a road

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93 *Id.* at 703, 52 P.3d at 847.
94 137 Idaho 428, 50 P.3d 443 (2002).
95 *Id.* at 432, 50 P.3d at 447.
96 *Id.*
97 *Id.*
98 2007 WL 4531556.

to the landowner's property. When this Court determined that the City of Sun Valley had indeed unreasonably interpreted its ordinances, the Court held the following:

> Lane Ranch has a substantial right to have its application evaluated properly under Title 7 of the Code. Their ability to access their property has been impeded and they are unable to develop their property for admittedly permissible uses under the applicable OR-1 zoning.[99]

As a result, the Idaho Supreme Court held that a substantial right of had been violated because the application was not "evaluated properly." This is precisely what occurred with Burns.

The cases discussed above and the language of Idaho Code § 67-5279(4) itself suggest that the substantial rights test under this statute is, in essence, a "harmless error" exception allowing the courts to overlook technical errors where no real harm was done. If it can be shown that the error would not have changed the outcome or was not necessary to form the basis of a Commission's decision, then a court may conclude that no substantial right was violated.

In response to Burns' claim that is has had substantial rights violated, the Commission has claimed that substantial rights have not been violated unless the harm done to the applicant is takings-like. In discussing the substantial right issue, the County states that "[t]here is also similarity in "takings" cases, where a regulation denies an owner of all economically viable use of land," and further that a taking "would be violative of a substantial right."[100]

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99 *Id.* at *4.

100 Respondent's Brief at 30.

As an initial matter, there is no Idaho case that equates violation of a substantial right with a "takings" analysis. Indeed, in the *Sanders Orchard v. Gem County* case,[101] discussed above, there was no discussion of a taking, yet the court still found that a substantial right had been violated. *Sanders Orchard* holds that there is sufficient prejudice to the substantial rights of an applicant if a county bases its decision on a finding which was not supported by evidence in the record. This is precisely what has occurred with Burns on a number of issues. This Court held similarly in the *Lane Ranch Partnership* case. Nor was there any discussion of a taking in *Evans v. Board of Commissioners of Cassia County.*[102] Although these cases do not contain the only instances where substantial rights were alleged to have been violated, they support Burns' contention concerning the substantial rights test.

It is clear that this Court will be the fact-finder in deciding whether Burns has had a substantial right or rights violated. However, as discussed above, Idaho cases on this issue do exist and are instructive and binding and should control the analysis of the substantial rights issue. The Commission's argument that takings law ought to be used to interpret the term "substantial rights" is simply misplaced.

Further, it is disingenuous for the Commission to claim that "Burns knew the property's use and purchased it after prior requests to change the comprehensive plan designation of the property had been denied."[103] Proposed development of the Burns parcel had been denied for an entirely

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101 137 Idaho 695, 52 P.3d 840 (2002).
102 137 Idaho 428, 50 P.3d 443 (2002).
103 Respondent's Brief at 31.

commercial proposal and for an entirely industrial proposal. Burns thereafter worked with Planning and Zoning, and based upon Planning and Zoning's suggestion, made a proposal for a small industrial area surrounded by a commercial buffer. Thus, after years of working with Madison County, it appeared that the appropriate combination of commercial and industrial uses was proposed at the North Interchange. Madison County also made the same suggestion to Walters, who then revised its application to incorporate this suggestion before obtaining the Commission's approval.[104] Additionally Burns commissioned a traffic study to review all relevant reports and information to refute the traffic concerns raised during the hearings.

Yet the Commission now argues that Burns should have known that the property would not be allowed for development because proposals for development had been denied previously. This ignores all of the work Burns undertook to cooperate and work with Madison County, something this Court found important in *Evans v. Teton County*, where the Court noted that "[t]he record indicates throughout this process Teton Springs adjusted its application in order to meet the requirements demanded by the Zoning Commission."[105] The Commission's claim ignores the cooperative nature of Burns, and further evidences the Commission's results-oriented decision.

For the foregoing reasons, Burns' substantial rights have been prejudiced by the Commission. The Commission made its findings and conclusions relative to traffic and other issues which were only supported by unsubstantiated "personal opinion and emotion" where professional, expert

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104 Compare R. Vol. 4 Walters 1 with R. Vol. 4 Walters 5. See also R. Exhibit *Public Hearing Transcript, RE: Walter's Concrete Request for Zone Change*, February 28, 2005, p.5 LL. 12-17 (testimony of Walters' counsel describing reasons for amending the Walter application).

105 *Evans v. Teton County*, 139 Idaho 71, 77, 73 P.3d 84, 90 (2003).

testimony had established the true facts. Furthermore, the Commission was entirely arbitrary and capricious in deciding the Walters and Burns matters as it has. These are not harmless errors. Burns has had substantial rights violated by the results-oriented decision of the Commission.

E. Approval of the Burns Application Would Not Be an Illegal Spot Zone.

The Commission argues that approval of the Burns application would be an illegal spot zone. This argument was never raised in the Planning and Zoning hearings and was not listed as a basis for denial of the Burns application by the Commission in its first written decision when it denied Burns' application, a decision that was appealed to the district court and remanded to the Commission. Moreover, there was no discussion of spot zoning at the April 13, 2006 hearing on remand, yet in the Commission's June 1, 2006 written decision, spot zoning was listed as a basis for denial of the Burns application.[106]

Further, the Commission stated previously on the record that the Burns proposal was not a spot zone. Consider this statement from Commissioner Passey:

> Also, Mr. Parkinson stated that we can't allow spot zoning and those types of things to happen throughout the County, yet we don't have enough industrial zoning available, so we have got to create pockets throughout the County or in one part of the County whenever we decide, or Planning and Zoning decides to do it.
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> Whether this is the place that is chosen or not, because of the lack of commercial and industrial in the County, then we have to address certain pockets or

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106 R. Vol. 4 Burns 29; Specifically, compare the first written decision found at R. Vol. 4 Burns 29 at 39 (the discussion of "Land Use") and the second written decision found at R. Exhibit *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Map Change to Amend a Property Designation from Agricultural to Commercial and Light Industrial Near the North Interchange of U.S. Highway 20*, June 1, 2006, at 21 (the discussion of "Land Use"). Only the second decision references spot zoning, an issue that was not discussed at the April 13, 2006 hearing on remand, a transcript of which is found in the record at. R. Exhibit *Public Meeting, RE Burn's [sic] Holdings, LLC*, April 13, 2006.

> spots in the County. It's where we choose a Trans Ag out in the middle of the agriculture that has no bearing. That's where we have concerns about spot zoning.[107]

Burns does not understand the Commission's change in position on this issue. In any event, this is an argument that has no merit.

In support of its claim that the Burns application would amount to a spot zone, the Commission states that the Burns site is on farm ground, and that the Commission has an obligation to protect such farm ground from development.[108] The Commission also stresses that the property is not within an area of city impact, nor are there any light industrial or commercial parcels in the vicinity of the Burns parcel. Response to these arguments are set forth above, and do not need to be repeated here.[109] Lastly, the Commission states that "it is impossible to comply with the Madison County comprehensive plan by placing an industrial use and commercial zone dropped right in the middle of a transitional/agricultural zone."[110]

As an initial matter, Burns would simply invite the court to consider these statements in light of the Walters decision, particularly as to the County's claim that it has a duty to protect agricultural and residential properties. Thus, the Walters proposal sought the rezone of over 130 acres of farm ground, and the result was a "drop" of industrial property into an agricultural/residential area.

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107 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Zone Change*, February 28, 2005, at p.35, LL. 1-14.

108 Respondent's Brief at 34.

109 *See* Section II.B.5 above.

110 Respondent's Brief at 35.

More importantly, however, the claims made the Commission quoted above illustrate how the Commission has arbitrarily relied on select provisions of the Comprehensive Plan with Burns while ignoring other equally important provisions. As noted in the *Urrutia* case quoted above, it is to be expected that land subject to a proposed change "may not agree with all provisions of the comprehensive plan,"[111] but may still be allowed if the proposed change comports generally with the Comprehensive Plan. Moreover, the Comprehensive Plan is not a zoning document; it is a planning document. There is no Idaho case or statute providing for a spot zone analysis in the context of a comprehensive plan amendment.

The Commission has therefore missed the mark in its analysis of what constitutes a spot zone. A claim that a local planning authority has engaged in spot zoning is nothing more than a claim that it has failed to zone in accordance with the Comprehensive Plan, as required under Idaho Code § 67-6511.[112] Zoning is not in accordance with the Comprehensive Plan if the zoning "singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner."[113]

The Commission argues that the Burns proposal would be a "type-two" spot zone under the principles articulated in *Evans v. Teton County,* as, the Commission argues, it would "single out a parcel of land use inconsistent with the permitted use in the rest of the zoning district for the benefit

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111 *Urrutia v. Blaine County*, 134 Idaho 353, 357-59, 2 P.3d 738, 742-44 (2000).

112 *Price v. Payette County Board of County Commissioners,* 131 Idaho 426, 958 P.2d 583 (1998); *Sprenger, Grubb and Associates, Inc. v. City of Hailey,* 127 Idaho 576, 903 P.2d 741 (1995).

113 *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003).

of an individual property owner."[114] The Commission argues that this is the case because "it is impossible to comply with the Madison County comprehensive plan by placing an industrial use and commercial zone dropped right in the middle of a transitional/agricultural zone."

The Commission's claim is not correct. A "type-one" spot zone is considered a reference "to a rezoning of property for a use prohibited by the original zoning classification" and is legal if it "is in accord with the comprehensive plan."[115] Thus, the spot zoning of property "is not per se illegal, but rather illegal only if lacking a reasonable basis."[116] This embodies Idaho's principle articulated above that a claim that a local planning authority has engaged in spot zoning is nothing more than a claim that it has failed to zone in accordance with the Comprehensive Plan, as required under Idaho Code § 67-6511.

The Burns proposal would be a legal type-one spot zone. As we have argued at length in the above Section II.B.1, the Burns proposal complies with the Comprehensive Plan. Further, it meets the general provisions for growth at the North Interchange. Both the City of Rexburg and Planning and Zoning agree with this assessment.

In addition, however, the County has failed to adequately plan for industrial zones in Madison County, as noted by Commissioner Passey.[117] The County's failure to plan should not equate to penalizing landowners such as Burns for proposing land use changes to allow for such uses. In fact, all of the current industrial sites were preexisting uses that existed before the county

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114 Respondent's Brief at 35.
115 *Evans*, 139 Idaho at 77, 73 P.3d at 90.
116 MCQUILLAN'S MUNICIPAL CORPORATIONS § 25.84 (2000).
117 See footnote 107 above.

adopted its Comprehensive Plan. The lack of zoning has prevented anyone from coming into Madison County to develop industrial uses to compete with other existing industrial uses, a practice that is contrary to the Comprehensive Plan goal "[t]o improve and diversify the local economy and create jobs for area residents, promoting high quality community growth that emphasizes better pay, better public facilities, and a diverse, stable business environment."[118] The County's failure to plan should not equate to penalizing landowners such as Burns for proposing land use changes to allow for such uses consistent with the Comprehensive Plan.

In Respondent's Brief, the Commission has made a conclusion that approval of the Burns application would be a "type-two" spot zone without going through the appropriate analysis. It has not presented sufficient evidence to support a claim that approval of the Burns application would not be in accordance with the Madison County Comprehensive Plan. In making its claim that it cannot "drop" a commercial/industrial parcel at the North Interchange, it has simply ignored that the property is located next to the major state highway in Madison County, ignored that the Comprehensive Plan encourages placement of such properties next to state highways, ignored past Madison County practices, and ignored the lack of industrial zoning in Madison County. In short, the County has not shown that there are no reasonable bases for allowing the proposed change, and therefore has not shown that approving the Burns application would be a type-two illegal spot zone. To the contrary, the Burns proposal would be a legal "type-one" spot zone, and this court found

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118 R. Exhibit 18, (Madison County Comprehensive Plan), at 13.

similarly in the *Evans* case, when it concluded that the "type-one" spot zoning in that case was "valid."[119]

In short, the spot zoning issue is irrelevant to this court's review and otherwise incorrect. Further, there is no distinguishing factor between Burns and Walters that would explain why the issue was not raised in the Walters hearing if in fact it had any merit, which it does not.

F. Burns, and Not the Commission, Is Entitled to An Award of Attorney's Fees.

The Commission argues that Burns is not entitled to attorney's fees under Idaho Code § 12-117, but that the Commission should receive such an award. The law as to an award of attorney's fees under this statute was recently summarized in the case of *Neighbors for a Healthy Gold Fork v. Valley County.*[120] In *Neighbors*, the court stated the following:

> To award attorney fees under I.C. § 12-117, the Court must not only find that the Board acted without a reasonable basis in fact or law, but it must also find in favor of the party requesting fees. *Canal/Norcrest/Columbus Action Committee v. City of Boise,* 136 Idaho 666, 671, 39 P.3d 606, 611 (2001). The purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made. *Canal/Norcrest/Columbus Action Committee,* 136 Idaho at 671, 39 P.3d at 611 (citing *Rincover v. State,* 132 Idaho 547, 549, 976 P.2d 473, 475 (1999)).[121]

Assuming that Burns prevails in this matter, this court will have found that the Commission acted without a reasonable basis in law or fact such that a reversal is warranted. If this is the case,

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119 *Evans*, 139 Idaho at 77, 73 P.3d at 90.
120 2007 WL 4531786.
121 *Id.* at *16.

then it seems rather clear that Burns would likewise be entitled to an award of attorney's fees as it has incurred a financial burden in order to correct mistakes that never should have been made, which is the very reason for Idaho Code § 12-117.

Conversely, assuming that the Commission prevails in this matter, the Commission is not entitled to an award of fees under Idaho Code § 12-117. Burns has presented this court with the opportunity to juxtapose two nearly identical land use applications decided at the same time where the Commission reached opposite outcomes. This case therefore presents much-needed guidance on the arbitrary and capricious standard in the LLUPA. Further, Burns is seeking a clarification and expansion of the principles articulated in *Evans v. Board of County Commissioners of Cassia County*, by asking this court to answer the question of what exactly the *Evans* case requires in the context of a land use hearing.

This Court has held that a party is not entitled to attorney's fees "if the issue is one of first impression in Idaho,"[122] and further, if a party presents a "legitimate question for this Court to address."[123] Because Burns has met these standards with the questions it has presented to this Court, an award of fees to the County would not be appropriate under Idaho Code § 12-117 if the County were to prevail on this matter.

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122 *Lane Ranch Partnership v. City of Sun Valley*, 2007 WL 4531556 at *4 (quoting *SE/Z Const., L.L.C. v. Idaho State University*, 140 Idaho 8, 14, 89 P.3d 848, 854 (2004)).

123 *Id.* (quoting *IHC Hospitals, Inc. v. Teton County*, 139 Idaho 188, 191-92, 75 P.3d 1198, 1201-02 (2003)).

III. CONCLUSION

For the reasons set forth above, this Court should reverse the Commission's decision and order the amendment requested by Burns to the Comprehensive Plan and zoning as requested in Burns' application. In addition, Burns should receive an award of its reasonable attorney's fees.

Respectfully submitted this 22nd day of February, 2008.

Donald L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 22nd day of February, 2008.

DOCUMENT SERVED: **APPELLANT'S REPLY BRIEF**

ATTORNEY SERVED:

Troy D. Evans
Madison County Prosecutor's Office
PO Box 350
Rexburg, Idaho 83440

[X] Mail [ ] Hand Delivery [ ] Facsimile

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